

Marxist Sociology of Law

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I think my speech will not be a betrayal of Marxist sociology of law. As a matter of fact, anybody who has some familiarity with Marxism has come to expect a bit of abstraction and generality from it and I do not want to disappoint them. In part this is also because I will try to sketch an honest answer to the question kindly asked by the organizer of this panel, about the present state of a Marxist sociology of law.

One who is familiar with this literature knows how broad and different is this field and how much the debates inside Marxism have consequences for the different positions one may take on the question of Marxist sociology of law. I will not go, here, through a review of these various positions because this has been done very finely in recent pieces such as, for instance, Steven Spitzer's article "Marxist Perspectives in the Sociology of Law," in the *Annual Review of Sociology* (1983) or Beirne and Quinney's introduction to their collection of essays, *Marxism and Law* (1982). The other thing that I won't do, because I don't have time to do it, will be to go into any discussion of the relation of Marxist sociology of law to the other perspectives that were presented. I hope that we will be able to do that later. What I want to do, instead, is to treat Marxism as a tool that we may use insofar as it makes sense to us for the solution of

research problems and insofar as it makes sense in order to give a description of social relationships in twentieth-century advanced industrial societies.

So, just a little of a historical premise: we can trace the emergence of a Marxist sociology of law, or maybe better the re-emergence of a Marxist sociology of law, to the period between the 1960s and the 1970s. I think that three features of what was going on in Western society in that period were important for this re-emergence.

The first one was that a critical stance in society developed in that period, *vis a vis* a whole set of various legal rules and institutions. It would be really hard to enumerate all of these. You can think of problems that at the time were seen as urgently pressing in the correctional and criminal justice systems, of issues having to do with labor law or with the safety of the workers, and so on. This happened in conjunction with the beginnings of a cultural revolution that was taking place in Western Europe, North America, and also in some of the Socialist and so-called Third World countries. This cultural revolution favored the process of questioning the legitimation of legal institutions and legal rules.

A second thing that happened was that the people who were involved within these institutions, legal practitioners and legal theoreticians—and here I think there is a very strong connection with what was said about critical legal studies—became worried about what their role was and what they could do, in which terms they could think about a process of delegitimation that was rapidly becoming professional dissatisfaction.

The third thing that happened was that at the same time a theoretical development within Marxism was going on, a development where, after a long period of prevailing so-called economism, finally the realm of the state, law, and politics was re-introduced into Marxist thought. For a while it seemed that this constituted an answer to the problems mentioned. Many people seemed interested in a critical approach to the law and they started to move towards a Marxist kind of analysis. But, I believe—and this is just a statement that I submit here and for which I don't claim to argue fully in the little time I have—the kind of Marxism that was offered to these legal practitioners and theoreticians was a rather ossified kind of Marxism. I also believe that this was not the least important reason why, after they became enamored with Marxism, their fascination was quick to fade away and people started to raise questions about this ossified picture of Marxism.

What was, or maybe better, what is this ossified picture? Well, schematizing a lot, it is essentially the idea, which I think is shared by many Marxists and even more so by many nonMarxists, that we have out there this big exogenous variable which is the economic structure or the capitalist mode of production, if you will, and furthermore, that this economic structure determines to a large extent

what the state and the law are, and that the law is seen as some kind of discourse, some kind of "talk" that comes from the state. The state and the law together are seen as representing the interest of capitalists and repressing workers. In the 1960s and 1970s there was a variation on this picture that usually went under the title of the "relative autonomy" of the state. The idea was still that the state and the law are undoubtedly this intervening variable between economic structure on one side and repression on the other, but that they have some leeway, that there is some space that they can occupy in a way which is not directly determined by the economic structure. But, as Steve Spitzer has shown quite convincingly in the mentioned article, I don't think that this concept says that much since "in the last instance" it is still the economy which determines everything.

There are three major problems with this picture, and I think that part of the interesting work that can be done today in Marxism and more specifically in Marxist sociology of law, has to do with an attempt at overcoming these three major problems.

The first one I would call, by the traditional definition, the problem of economism. I think that this problem has something to do with the fact of having given weight, in the reading of Marx's works and in a lot of the Marxism that has been done after Marx, to the quite unfortunate architectonic metaphor of structure and superstructure instead of having paid attention to the substance of what Marx was trying to do in *Capital*, the subtitle of which, if you remember, is "A Critique of Political Economy." In other words, in a manner which was consistent with the dialectical method that Marx had learned from Hegel, what Marx wanted to do was to express a theory capable of giving voice and expression to a practical critique that he was seeing as emerging from the early organizing of the working class especially in England and in France. He saw as his main task then, or at least as one of his main tasks, to criticize the very idea of the economic man, of the *Homo oeconomicus* as it had been developed in two centuries of social contractual theories, between the seventeenth and nineteenth centuries.

In this sense, I think that the famous *Manuscripts* of 1844, which are usually presented by Althusserians as evidence of the metaphysical and still Hegelian tradition against which Marx was trying to rebel, these *Manuscripts* are, I think, to be taken very seriously. They deal, in fact, exactly with this problem: to what extent the view derived from political economy is a view of man and of woman that reduces their moral and philosophical reality, a reality which is much richer and much more open to possibilities than the one portrayed by the political economists. If there is some kind of "exogenous" variable, if you will, that is possible to find in Marx's work, one should turn, I think, to the *Manifesto* of 1848 and to the quite clear statement in that work that if there is something that characterizes human history, the history of humankind as a whole, that something is class struggle. If we try to look at the body of

Marx's work from this perspective, I think that we realize that, in this ongoing struggle, political and legal elements may be seen as dominant, insofar as they express and serve the institutionalization of the power of one class over the other. In other words, it is very hard to understand the concept of surplus value in *Capital* without understanding the concept of discipline. And at the same time, it is very hard to understand the critique of the process of exploitation without assuming a position of moral critique, of moral denial, of the "justness" of capitalist social relationships.

This is in part what I tried to show with reference to the origin and the history of penitentiary institutions in my own work, *The Prison and the Factory* (1979; with Pavarini). But there are two other problems of which I didn't take any account in that work and that, I think, are quite important. The first problem is what I would call the hypostatization of the state concept. The question of the theory of the state is such a huge question I can only hint at it here. What happened in the 1960s and the 1970s was also that the discovery of "the political," as such, contributed to fueling among Marxists an enormous interest in the concept of the state. This happened, of course, in connection with a startling increase of the welfare state and of the intervention of the state in the economy, especially in European countries. Theorists then started to put more and more things into this box, the state, with the curious result that while the state was "doing" more and more things, on the other hand it was very hard to find any kind of specific and convincing definition of what "state" as a matter of fact was (Melossi, "A Politics without a State . . .," *Research in Law, Deviance, and Social Control*, 1983).

Probably the peak of this kind of attitude was reached by Althusser in his 1970 piece ("Ideology and Ideological State Apparatuses," *Lenin and Philosophy*) on so-called state apparatuses where almost all social institutions were somehow seen as state institutions either of the repressive or hegemonic kind. Althusser had taken this idea from Gramsci (*Prison Notebooks*, 1929-1935), who in turn had taken it from Machiavelli (*The Prince*, 1513). But in Gramsci this idea was connected with a historical standpoint, a discussion of Hegel's idea of the ethical state. The whole idea of hegemony was seen within this perspective and made possible for Gramsci to deal with it as with a problem. Gramsci, for instance, could take seriously the idea of the withering away of the state and see it as a process belonging to the transition from capitalism to socialism. This whole dynamic perspective was essentially lacking in Althusser's rigid and indeed rather "ideological" reconstruction.

Finally, the last point I'd like to make is that there is a tendency in some of the contemporary Marxist research in sociology of law to assume what I would call an attitude of "looking back," that is, an attitude that stands to preserve the purity of the tradition from any kind of contamination with contemporary trends in sociological thought. The problem with this is that preserving the purity of the

tradition often means to give a description of a society which is a nineteenth-century society more than a twentieth-century society. There are reasons why contemporary sociological theories are different from those of the last century, and I think that this has to do with the way in which contemporary society is organized. More specifically, what I'm thinking of is the kind of sociological work that has been done on social construction of reality, or on the way in which administrative and bureaucratic practices filter reality as we see it. This is a kind of work of the utmost importance in understanding contemporary social relations, especially in advanced industrial societies, Western Europe and the United States. Once again I think that Marx here did better than many contemporary Marxist authors in texts like the *Grundrisse* (1850-1859), the outline of *Capital*, where Marx at least saw the beginnings of some of these developments and took them seriously (Melossi, "Overcoming the Crisis in Critical Criminology . . .", *Criminology*, 1985).

Is any conclusion possible? I think that, if we want to overcome the problems hastily pointed out, what we have to confront in Marxist sociology of law is a task which is common, I believe, to current sociological thinking in general (see, for instance, Giddens, *The Constitution of Society*, 1984). This task consists in an attempt at criticizing what I would call the reification of the categories of economy, politics, and the law. These categories are superimposed on social reality instead of being seen as the outcome of social action (Melossi, "Punishment and Social Action . . .", *Current Perspectives in Social Theory*, 1985). In conclusion, for the reasons just said, and in spite of much recent sociological Marxism, I believe that what I would call the historical embeddedness of Marx's social categorization still constitutes a fundamental lesson also with regard to the sociological study of legal phenomena.

